(17)

Office - Supreme Court, U. S.
FILED
JAN 18 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 658

ANTOINETTE K. BROWN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

S. Leo Ruslander,
Counsel for Petitioner.

Samuel Kaufman,
Julian H. Ruslander,
Of Counsel.

INDEX.

Subject Index.

	Page
Opinions below	1
Statement of the matter involved	2
Jurisdictional basis	3
The questions presented	4
Reasons relied upon for allowance of the writ	4

Citations.

Cases:

Cory v. *Commissioner*, 126 F. (2d) 689 (C. C. A. 3)	5
Helvering v. *Clifford*, 309 U. S. 331 (1940)	3
Helvering v. *Horst*, 311 U. S. 112 (1940)	4
Helvering v. *Stuart*, 63 U. S. 140 (1942)	4, 5

Statutes:

Revenue Act of 1934:	
Section 22(a)	3, 4, 6
Sections 166 and 167	3

Miscellaneous:

Judicial Code, as amended (Title 28, Code of the Laws of the Untied States, Section 347), Section 240(a)	3, 4
51 Yale Law Journal, 213, 249	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 658

ANTOINETTE K. BROWN,

vs. *Petitioner,*

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Supreme Court of the United States:

Antoinette K. Brown, the petitioner, respectfully presents this petition for review on writ of certiorari of a decision of the United States Circuit Court of Appeals for the Third Circuit.

Opinions Below.

The first opinion of the Board of Tax Appeals is reported at 42 B. T. A. 693. The first opinion of the Circuit Court of Appeals is reported at 122 F. (2d) 800. The second opinion of the Board of Tax Appeals is reported

at 46 B. T. A. 782. The second opinion of the Circuit Court of Appeals is reported at — F. (2d) —.

Statement of the Matter Involved.

The petitioner in 1927 established an irrevocable trust, the income of which was payable outside the family group, $35.00 a month to a retired servant, and the balance to a friend. The Commissioner in 1939 (12 years later), for the first time asserted that the trust income was taxable to petitioner (under Sections 166 and 167 of the Revenue Act) and determined a deficiency of $11,133.06 in petitioner's income tax for 1935. A description of the trust agreement as found in the opinion of the Circuit Court of Appeals of November 20, 1942 (R. 48), is as follows:

> "* * * The purpose of the trust was not to effect a saving in income taxes. The term was for the life of the settlor. Upon termination of the trust the corpus was to go to her estate. The settlor retained the power to modify the trust: 1. She could increase the principal. 2. She could change both the beneficiaries and the proportion of the income payable to any beneficiary except that such changes could not be for the benefit or use of the settlor. 3. She could (and did) substitute trustees. 4. Similar powers of modification were retained as to the disposition of the corpus upon the settlor's death as were retained with respect to income during her lifetime."

Petitioner did not exercise any of her reserved rights until after 1935 when she made her husband, Paul G. Brown, Trustee, and at the death of the friend in 1937 she made him the beneficiary in her place and stead. The husband had income from other sources at least equal to petitioner's income (R. 22). The Commissioner has also asserted that the trust income is subject to gift taxes amounting to $14,000.00, exclusive of interest (R. 27).

The Board of Tax Appeals, in its first opinion (R. 6), held (1) that the Commissioner could not be sustained on the argument that the trust was revocable because it provided for no estate in remainder; (2) that Sections 166 and 167 of the Revenue Act of 1934 did not apply; and (3) as to Section 22(a) resorted by the Commissioner for the first time in his brief, that the petitioner had never had an opportunity to be heard on this point, and further (R. 8):

> "Here, however, the Commissioner has failed to make a case. He cites *Helvering* v. *Clifford,* 309 U. S. 331. The case is not in point * * *."

On review, the Circuit Court of Appeals unanimously agreed with the Board that the income of the trust was not taxable to petitioner under Sections 166 and 167 but divided on the question whether the income was taxable to petitioner under Section 22(a). The decision of the Board was reversed and the cause remanded to the Board "with direction to permit the parties to adduce additional evidence and to decided the issues presented by Section 22(a)" (R. 14).

After further hearing, at which petitioner offered the testimony of one witness (originally the facts had been stipulated), the Board decided that as the stipulation and the new evidence made no stronger case for the petitioner than did the stipulation alone, the law as established by the Circuit Court of Appeals must stand, and therefore the income of the trust is taxable to the petitioner under Section 22(a) of the Revenue Act of 1934 (R. 35).

On appeal from this decision, the Circuit Court of Appeals for the Third Circuit affirmed the decision of the Board (R. 50).

Jurisdictional Basis.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (Title 28) Code of

the Laws of the U. S., Section 347) to review the decision of the United States Circuit Court of Appeals for the Third Circuit entered on November 20, 1942.

The Questions Presented.

1. Is the question of ownership of trust income a question of fact which, if supported by substantial evidence, makes the decision of the Board of Tax Appeals binding upon the Circuit Court of Appeals?

2. Whether trust income permanently and irrevocably dedicated for the use and benefit of others than the settlor may be treated for tax purposes as belonging to the settlor because of unexercised reserved powers to change beneficiaries.

3. Did the Circuit Court of Appeals err in holding that under the guiding precedents, beginning with *Helvering* v. *Clifford,* 309 U. S. 331 (1940), and *Helvering* v. *Horst,* 311 U. S. 112 (1940), and ending with *Helvering* v. *Stuart,* 63 U. S. 140 (1942), the income of petitioner's 1927 trust was includable in her 1935 income under Section 22(a) of the Revenue Act of 1934?

Reasons Relied Upon for Allowance of the Writ.

I. The decision of the Circuit Court of Appeals for the Third Circuit is, on the first question as above presented, in direct conflict with decisions of the Circuit Courts of Appeals of the Sixth and Seventh Circuits. This conflict is set out and commented on in the opinion of the Circuit Court of Appeals as follows (R. 49):

> "This argument finds support in *Commissioner of Internal Revenue* v. *Armour,* 125 F. (2d) 467 (C. C. A. 7, 1942) and *Commissioner of Internal Revenue* v. *Goulder,* 123 F. (2d) 686 (C. C. A. 6, 1941). It stems

from certain language in the opinion of the Supreme Court in *Helvering* v. *Clifford* which was thoroughly examined and discussed by the Second Circuit in *Commissioner of Internal Revenue* v. *Berolzheimer,* 116 F. (2d) 628 (C. C. A. 2, 1940). We agree with that decision. * * *''

II. There are no decisions of the Supreme Court which have removed the uncertainty of the rule to be applied in this case and many other like cases now before the courts. As pointed out in *Cory* v. *Commissioner,* 126 F. (2d) 689 (C. C. A. 3):

> ''Hardly had the *Clifford* decision been promulgated when repercussions were heard. It has been said that few tax problems in recent years have caused as much litigation as this one decision.
>
> ''The principal difficulty lies in the fact the Supreme Court's decision merely roughed in the broad outline of taxability and left the completion of the picture to future decisions.''

III. In *Helvering* v. *Stuart, et al.,* 63 U. S. 140 (11/16/42), cited by the Circuit Court of Appeals in its opinion in the case at bar, the Supreme Court held that since under the Illinois Law the power given to two non adverse interest co-trustees (wife and brother) of the grantor to change the income beneficiaries could not be exercised by them for grantor's benefit (same in the instant case under the New York law), the income was not taxable to him. The court distinguished the *Stuart* case from the *Clifford* case by pointing out and emphasizing the distinction between the ''economic gain'' which the grantor may obtain through control of a trust and ''non-material satisfactions'' which he may derive from the exercise of a power to direct the distribution of income to others than himself and for which the court declares him non-taxable. And yet, in the case at bar, the trust income is taxed to petitioner because of

these "non-material satisfactions." Even in the later years not here at issue, when petitioner's husband was in receipt of part of the trust income, petitioner derived no "economic gain" thereby because, as established by the evidence, his taxable income was in excess of her income.

IV. This petitioner is entitled to certainty when arranging her affairs and it is inequitable to change the rules by "judicial legislation" when the rules followed for deflection of the income here at issue, not rendered nugatory by statute, have for some time been successfully used with the acquiescence of the Commissioner and without imposition of penalizing taxes.

V. Petitioner cannot achieve status quo by surrendering her power to reallocate the trust income because of the gift taxes now asserted against her. Yet in 1927, when the trust was created, and for many years thereafter, even the Commissioner did not contend that taxpayers in this class of cases were taxable on trust income under Section 22(a). In this very case the Commissioner relied solely upon Sections 166 and 167 of the Revenue Act of 1934 and it was not until after the case was heard in the Board that the Commissioner in his Brief raised this issue.

VI. The test of the *Clifford* case as to whether or not the petitioner was poorer after the creation of the trust, and the harshness of the rule now contended for by the Commissioner, are aptly, even though only theoretically, met and demonstrated if we take an illustration used in 51 Yale Law Journal, 213, 249 and apply it to the facts of this case.

Assume that petitioner, being of an adventurous turn of mind or urged into losing ventures by outside influences, had, as a result of the panic of 1929, lost everything she had, including her husband, and only the trust assets and trust

income remained. The consequent trust income would, in 1935, be taxable to the now penniless petitioner and in addition to income taxes she would owe each year a gift tax. No change in beneficiaries could divert trust income to the payment of these taxes because by the terms of the trust agreement the income cannot be "paid or applied to the use or benefit" of petitioner.

WHEREFORE, It is respectfully submitted that the Supreme Court should grant this petition for review on writ of certiorari of the decision of the Circuit Court of Appeals for the Third Circuit.

S. LEO RUSLANDER,
Pittsburgh, Pa.,
Counsel for Petitioner.

SAMUEL KAUFMAN,
JULIAN H. RUSLANDER,
Of Counsel.

(4070)